TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 558. 188.

THE UNITED STATES, APPELLANT,

v.

THE BETHLEHEM STEEL COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY '22, 1906.

(20060)

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In the Court of Claims of the United States.

E BETHLEHEM IRON COMPANY
v.
THE UNITED STATES. } No. 22628.

I. *Petition.*

(Filed September 16, 1901.)

the honorable the Chief Justice and judges of the Court of Claims:

The claimant respectfully shows:

1. The claimant is a corporation duly incorporated under the laws of State of Pennsylvania, having its principal place of business in the n of South Bethlehem in said State.

2. On or about April 4, 1898, the claimant and the United States ered into a contract, a copy of which is hereunto annexed, marked Exhibit A," and made part hereof, whereby the claimant, among other ngs, agreed:

'That the claimant would manufacture for and deliver to the United tes free on board the cars at South Bethlehem, six disappearing gun carriages for 12-inch breech-loading rifles for the sum of thirty-six thousand dollars each, the said carriages to be constructed in accordance with instructions, specifications, and drawings attached and forming part of the said contract, the first carriage to be com-ted and delivered within four months from the date of the contract, l the remaining five carriages within six months from the date thereof; t all work done under the contract at all stages of its progress should s the inspection prescribed by the contract, and be approved by cers of the Ordnance Department before being accepted by the United tes; that all details of construction or design of the said carriages uld be subject, without additional cost to the United States, to such ght changes, not materially affecting the cost of the work, as the Ord-nce Department might order as the work progressed; that changes terially affecting the cost of manufacture should, if they increased the l cost, be paid for by the United States, and, if they decreased the l cost, should be allowed for by the claimant at sums satisfactory the Chief of Ordnance, and that if changes so ordered by the Ord-nce Department caused delay in the completion of the contract, or if claimant sustained losses of material provided by it for the said gun riages, the claimant should be allowed a reasonable amount of time addition to that prescribed in the contract within which to complete l deliver the said gun carriages; that if any of the said gun carriages uld not be delivered by the claimant at the time prescribed by the ntract, and the Chief of Ordnance should so order, there should be ducted from the contract price a penalty at the rate of thirty-five dol-s per day for each day of delay in the delivery of the gun carriage, l all penalties so incurred by the claimant should be set off against yments to be made under the contract by the United States."

The United States by the said contract agreed to pay the
3 claimant the sum of thirty-six thousand dollars ($36,000) for each one of the said gun carriages, in installments payable as follows: "twenty-five per centum of the price of each gun carriage upon the final acceptance of the material to be used in the construction thereof; fifty per centum of the price upon the completion and delivery of the gun carriage; and the remaining twenty-five per centum upon its final acceptance."

3. Thereafter the claimant procured all materials required to construct the said gun carriages, and proceeded with the work of manufacturing the same, and, except in so far as the claimant was hindered and delayed by losses of materials which had been provided for the said gun carriages and by changes in the plans or construction of the said gun carriages ordered by the Bureau of Ordnance, and by other acts or omissions of the United States, it did and performed all acts and things which by the said contract it had undertaken to do and perform, and completed the said six gun carriages and delivered them to the United States and the United States has finally accepted the same.

4. The completion and delivery of each of the said gun carriages was delayed for the period next hereinafter named, to wit:

1st	carriage,	177 days.
2d	"	187 "
3d	"	165 "
4th	"	188 "
5th	"	175 "
6th	"	204 "

But all of the said delays were occasioned by losses of material caused by changes in the plans or construction of the said gun carriages, from time to time ordered by the Chief of Ordnance, which materially
4 increased the time required to complete them. The claimant was in no wise responsible for the said delays nor subject to have any deduction made from the contract price to be paid by the United States for the said gun carriages or any one of them.

5. On June 28, 1901, the claimant having delivered the said six gun carriages to the United States and performed all other things which by its said contract it had undertaken to do and perform, and the United States having finally accepted all of the said gun carriages, and the claimant having been paid by the United States the sum of $162,000 in several part payments made on account of the contract price of the said gun carriages, became entitled to receive from the United States the balance of the said contract price, namely, the sum of $54,000, and the claimant demanded payment of the same, but the United States refused to pay the claimant the amount of the said balance, and offered to pay the sum of $33,000, in full settlement thereof, maintaining that the claimant was subject to penalties for delays in the delivery of the said gun carriages to the amount of $21,000; whereupon the claimant duly protested against the refusal of the United States to pay the whole of the said balance, and duly protested against the said deduction therefrom of the said sum of $21,000, but the United States, contrary to the terms of its said contract, refused to allow the claimant a reasonable extension of the time pre-

scribed for the completion and delivery of the said gun carriages, to cover the delays caused by acts of the United States as aforesaid, and the claimant, being unable to secure the payment of the whole of said balance, received from the United States the said sum of $33,000 and receipted for the same, subject, however, to its said protest, whereby it reserved the right to claim, sue for, and collect the said sum of $21,000, unlawfully withheld from it as aforesaid.

5 6. The claimant is the owner and the only person interested in the claim above set forth, and no assignment or transfer of the same or any part thereof, or interest therein has been made. The claimant is justly entitled to receive from the United States under its said contract the sum of $21,000, after allowing all just credits and offsets. The claimant has made due demand upon the United States for the payment of the said sum, but the same has not been paid nor any part thereof. The claimant has always borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against it.

Wherefore the claimant prays for judgment against the United States in the sum of twenty-one thousand ($21,000) dollars, and for such further relief as it may be entitled to receive both at law and in equity in the premises.

THE BETHLEHEM IRON COMPANY,
By ROBERT P. LINDERMAN, *President.*

McCAMMON & HAYDEN,
Attorneys for Claimant.

STATE OF PENNSYLVANIA,
County of ———, *ss:*

Robert P. Linderman being duly sworn, deposes and says that he is the president of the Bethlehem Iron Company, the claimant named in and which subscribed the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 16th day of August, 1901.

My commission expires January 31, 1903.

[SEAL.] HORACE DISBROW REEVE,
Notary Public.

6 EXHIBIT "A."

Copy.
(Form 23.)

ORDNANCE DEPARTMENT, U. S. A.

Articles of agreement entered into this fourth day of April, eighteen hundred and ninety-eight, between The Bethlehem Iron Company, of South Bethlehem, in the county of Northampton, State of Pennsylvania, of the first part, and the United States, by Brig. Gen. D. W. Flagler, Chief of Ordnance, U. S. Army, acting under the direction and by authority of the Secretary of War, for and in their behalf, of the second part.

1st. This agreement witnesseth, that the said parties of the first part, for themselves and their successors, &c., and the said party of the second part, for and in behalf of the United States of America, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other as follows, viz:

Under advertisement dated , 189 , the said parties of the first part do hereby contract and engage with the said United States to manufacture, for the Ordnance Department, U. S. Army, in accordance with said instructions to bidders as amended, specifications and drawings, all of which are hereto attached and form part of this contract.

Six (6) disappearing gun carriages, model 1896, for 12-inch B. L. rifles, drawings dated April 27 and June 19, 1896 (latest revision July 14 and December 30, 1897), at thirty-six thousand dollars ($36,000) each, free on board cars at South Bethlehem, Pa.

The first carriage to be delivered within four (4) months from date of this contract, and the remaining five (5) carriages within six (6) months from date of this contract.

7 It is further stipulated and agreed that the party of the first part will furnish such limited additional number of these carriages, at the price and rate of delivery stated, as the party of the second part may desire, under available appropriations.

It is further stipulated and agreed that all details are to be subject to such slight changes, not materially affecting the cost of the work, as the Ordnance Department may wish to make as the work progresses, and any changes materially affecting the cost of manufacture are to be paid for, if increasing, and allowed for if decreasing, the said cost, at a price to be satisfactory to the Chief of Ordnance. If these changes cause delay in the completion of this contract a reasonable allowance of time therefor shall be made.

It is further stipulated and agreed that if any carriage herein contracted for is not delivered by the party of the first part at the times specified herein, there will be deducted, in the discretion of the Chief of Ordnance, thirty-five ($35) dollars per day from the price to be paid therefor for each day of delay in delivery of each carriage, respectively. But if at any time the Chief of Ordnance shall decide that continuous and great delay or other serious default has occurred, he may, to protect the interests of the United States, apply the provisions of the 5th section of the regular contract form and waive further per diem deduction in price.

All penalties incurred under this contract shall be offset against any payments falling due to the said party of the first part.

The work must pass the required inspection at all stages of its progress, and be approved by the officers of the Ordnance Department before being accepted and paid for by the United States.

8 It is further stipulated and agreed that payment for the carriages herein contracted for shall be made as follows, viz:

Twenty-five (25) per cent of the price of each carriage will be paid upon the provisional acceptance of material of the value of all the material therefor, fifty (50) per cent upon delivery of the completed carriage, and twenty-five (25) per cent upon its final acceptance.

If any doubts or disputes arise as to the meaning of anything in this or any of the papers hereunto attached and forming this contract, the

matter shall be at once referred to the Chief of Ordnance, U. S. Army, for determination. If, however, the party of the first part shall feel aggrieved at any decision of the Chief of Ordnance, it shall have the right to submit the same to the Secretary of War, and his decision shall be final.

2d. All the carriages herein contracted for shall be delivered by the said parties of the first part as aforementioned.

4th. For the carriages herein contracted for, which shall be delivered, inspected, and accepted as aforesaid, there shall be paid by the United States to the said parties of the first part, on bills in duplicate, made in approved form, and duly authorized by the proper officers of the Ordnance Department, the price aforementioned in the funds furnished for the purpose by the United States.

5th. If any default shall be made by the parties of the first part in delivering all or any of the carriages mentioned in this contract, of the quality and at the times and places herein specified, then, in that case, the said party of the second part may supply the deficiency by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said parties of the first part shall be charged with the expense resulting from such failure. Nothing contained in this stipulation shall be construed to prevent the Chief of Ordnance, at his option, upon the happening of any such default, from declaring this contract to be thereafter null and void, without affecting the right of the United States to recover for defaults which may have occurred; but in case of overwhelming and unforeseen accident by fire or otherwise, the circumstances shall be taken into equitable consideration by the United States before claiming forfeiture for nondelivery at the time specified.

9

6th. Neither this contract nor any interest therein shall be transferred by the said parties of the first part to any other party; and any such transfer shall cause the annulment of the contract so far as the United States is concerned. All rights of action, however, to recover for any breach of this contract by the said parties of the first part are reserved to the United States.

7th. No Member of or Delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

THE BETHLEHEM IRON COMPANY,
By ROBT. P. LINDERMAN, *President.*
D. W. FLAGLER,
Brig. General, Chief of Ordnance.

Witness:
Attest:
ABRAHAM S. SCHROPP,
Secretary.

10 BETHLEHEM IRON COMPANY, CLAIMANT, }
v. } No. 22628.
THE UNITED STATES, DEFENDANT. }

II. *Motion for the substitution of the Bethlehem Steel Company as claimant.*

Now comes the Bethehem Steel Company and shows the court:

1. On April 4, 1898, the Bethlehem Iron Company, the claimant in the above-entitled cause, entered into a contract with the United States, and thereafter performed the same, as set forth in the petition herein.

2. On or about August 16, 1901, the said Bethlehem Iron Company was dissolved by the voluntary surrender of its franchises, and the said Bethlehem Steel Company forthwith became its successor, acquiring all of its assets and assuming all of its contractual liabilities.

3. On June 6, 1902, there was approved an act of Congress entitled "An act making appropriations for fortifications and other works of defense, for the armament thereof, for the procurement of heavy
11 ordnance for trial and service, and for other purposes," which, among other things provided:

"All contracts of the Bethlehem Iron Company, of South Bethlehem, Pennsylvania, heretofore made between it and the United States, except the contract of November seventh, eighteen hundred and ninety-one, for one hundred eight, ten, and twelve-inch guns, shall be completed by its successor, the Bethlehem Steel Company, or its successor, which has acquired or may acquire all of its assets and has assumed or may assume all of its liabilities under the said contracts; and the said Bethlehem Steel Company, or its lawful successor, upon giving good security in same form and amount, conditioned for the performance by it of the said contracts, shall be substituted therein for the said Bethlehem Iron Company and be entitled to exercise all rights thereunder which the said Bethlehem Iron Company had or would have had if it had continued in existence."

4. On February 10, 1903, the said Bethlehem Steel Company, the successor of the said Bethleham Iron Company, in compliance with the requirement prescribed by the said act, as a condition precedent to its substitution for the said Bethlehem Iron Company in contracts between the latter and the United States, filed with the Chief of Ordnance, a declaration whereby it asked that such substitution be made, and gave good security to the United States, conditioned for the faithful per-
12 formance by it of the said contract of April 4, 1898, in the same form and amount as the security originally given for such performance by the said Bethlehem Iron Company.

5. By reason of these facts the said Bethlehem Steel Company became and now is entitled to be substituted for the said Bethlehem Iron Company in the same contract, and to have and exercise all rights thereunder, which the said Bethlehem Iron Company had or might have had if it had continued in existence.

Wherefore the petitioner prays the court to substitute it for the said Bethlehem Iron Company as the claimant in this cause, with authority to prosecute the same to judgment.

McCAMMON & HAYDEN,
Attorneys for Claimant.

Filed March 24, 1903.

APRIL 27, 1903.

THE BETHLEHEM IRON COMPANY,
v.
THE UNITED STATES. } No. 22628.

The motion that the Bethlehem Steel Company be substituted as claimant herein was allowed.

BY THE COURT.

13 III. *Traverse.*

(Filed November 15, 1905.)

In the Court of Claims of the United States. Term A. D. 1905–1906.

BETHLEHEM STEEL CO.,
v.
THE UNITED STATES. } No. 22628.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

14 IV. *Argument and submission of case.*

This cause was argued by Mr. Hayden for the claimant and by Mr. Collins for the defendants on the 15th and 16th days of November, 1905, and submitted.

15 V. *Findings of fact and conclusion of law, and opinion of the court.*

(Filed December 4, 1905.)

BETHLEHEM STEEL COMPANY,
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant, the Bethlehem Steel Company, is a corporation incorporated and existing under the laws of the State of Pennsylvania. On April 27, 1903, the claimant, being the successor of the said Bethlehem Iron Company, and having complied with the conditions prescribed by the act of Congress entitled "An act making appropriations for fortifications and other works of defense, for the armament thereof, for the procurement of heavy ordnance for trial and service, and for other purposes,"

approved June 6, 1902 (32 Stat. L., 305, 308), was, pursuant to the provisions of the said act, substituted for the said Bethlehem Iron Company as claimant in this cause.

II.

On or about March 8, 1898, the defendants, through the War Department, advertised as required by law for sealed proposals for the construction of six disappearing gun carriages for 12-inch breech-loading rifles, model of 1896, the specifications accompanying this advertisement setting forth the character and extent of the work to be done.

III.

In response to said advertisement the claimant company, among others, submitted sealed proposals as follows:

"PROPOSAL NO. 1.—We propose to furnish five or more 12-inch disappearing gun carriages, model 1896, for the sum of $31,000.00 each, and to deliver the first carriage within six months of date of contract, to be followed by two carriages every three months thereafter; or

16 "PROPOSAL NO. 2.—We propose to furnish five or more 12-inch disappearing gun carriages, model 1896, for the sum of $33,000.00 each, and to deliver the first carriage within five months from date of contract, to be followed at the rate of one carriage every month thereafter; or

"PROPOSAL NO. 3.—We propose to furnish five or more 12-inch disappearing gun carriages, model 1896, for the sum of $35,000.00 each, delivering the first carriage within four months and the second within five months of date of contract; the remaining carriages to follow at the rate of three carriages every two months thereafter; or

"PROPOSAL NO. 4.—We propose to furnish five or more 12-inch disappearing gun carriages, model 1896, for the sum of $36,000.00 each, delivering the first carriage in four months, the second in five months, and the remaining carriages to follow at the rate of two carriages every month thereafter."

The foregoing alternative proposals were made in consequence of a letter written the claimant company by the Chief of Ordnance, dated March 11, 1898, which letter is as follows:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, March 11, 1898.*

"GENTLEMEN: It is suggested that in making bids for carriages you estimate, first, on the price of carriages under the supposition that the works will run for twenty-four hours; second, that later, if it be found advantageous, the ordinary working hours may be observed. It is considered best that bids should be made for carriages by numbers, as, for instance, so much for five 8-inch carriages, for six, eight, etc. Therefore it is considered judicious that bids should be made for rapid delivery of a certain number of carriages or for less rapid delivery of the same. It should be understood, however, that time will be conconsidered very important.

"Respectfully,

D. W. FLAGLER,
"*Brig. Gen., Chief of Ordnance.*"

IV.

The defendants, through the War Department, accepted proposal No. 4 of the claimant company.

V.

In drawing up the contract between the United States and the claimant company a slight modification of proposal No. 4 was decided upon, which was as follows:

Whereas in proposal No. 4 claimant company was to deliver five or more carriages, the first in four months, the second in five months, and the remaining ones to follow at the rate of two carriages per month. In drawing up the contract this was changed so as to provide for the delivery of one carriage in four months (as proposed) and five carriages in six months from the date of contract, thus reducing the time of the delivery of all the carriages from seven to six months, this reduction of the total delivery being offset by the increased latitude given claimant company as to intermediate deliveries.

17 VI.

On April 4, 1898, the Ordnance Department transmitted a form of contract of even date to the claimant company for execution and return by letter, as follows:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, April 4, 1898.*

"THE BETHLEHEM IRON CO., *South Bethlehem, Pa.*

"GENTLEMEN: I am instructed by the Chief of Ordnance to transmit herewith contract, in quintuplicate, dated the 4th instant, for six 12-inch disappearing gun carriages, model 1896, for execution and return to this Office.

"Respectfully,
R. BIRNIE,
"*Capt., Ord. Dept., U. S. A.*"

To this letter the claimant company made reply on April 5, 1898:

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa., April 5, 1898.*

"CHIEF OF ORDNANCE, U. S. A.,
"*War Department, Washington, D. C.*

"SIR: We have examined the contract forms, covering six disappearing gun carriages, model 1896, for 12-inch B. L. rifles, for which we submitted proposals under date of the 19th ultimo, and write to call your attention to the third clause, relating to our liability on account of any patent rights granted by the United States, is not struck out, as has been done in the case of previous contracts for carriages.

"We also note that the penaltymentioned in the contract for each day of delay in delivery of each carriage is $75 instead of $10, as is stipulated in the instructions to bidders and specifications.

"We made our bid under the understanding that the penalty for non-delivery was to be $10 per day, and we respectfully request that the contract forms may be modified in accordance with this understanding.

"We return herewith the contract forms, and remain,

"Respectfully,

"THE BETHLEHEM IRON COMPANY,
"R. W. DAVENPORT,
"*Second Vice-President.*"

Whereupon the claimant company was informed by the Chief of Ordnance, by letter of April 9, 1898, as follows:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, April 9, 1898.*

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa.*

"GENTLEMEN: In reply to your letter of April 5, 1898, returning contract forms, I have the honor to inform you that your request
18 in regard to your liability on account of patent rights has been complied with and the third paragraph has been stricken out.

"In regard to the penalty for delay in delivery being $75 per day instead of $10 per day, I have to state that the former amount is the average difference in time of delivery between your price recently bid for slow delivery of these carriages and the price under the accepted bid. The Department feels it to be just that this average difference should be the prescribed penalty; but, if you should prefer, instead of taking the average difference, that the exact difference per day for each particular carriage should be prescribed, the forms will be altered accordingly.

"The contracts are returned, hoping this explanation will be satisfactory.

"Respectfully,

D. W. FLAGLER,
"*Brigadier-General, Chief of Ordnance.*"

Thereafter it was found that an error had been made in the above computation, in that the $75 per day deduction provided for should have been $35 instead, and the claimant company was duly informed of this by letter dated April 16, 1898, which is as follows:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, April 16, 1898.*

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa.*

"(Through the Inspector of Ordnance, U. S. A.)

"GENTLEMEN: Referring to my letter, No. 21985, of the 9th instant, I would invite your attention to the fact that an error was made in the computation in the amount of the deduction in price per day of delay in delivery of 12-inch disappearing carriages, L. F., model of 1896, recently

ordered from you, and to inform you that the contract should read that such deduction in price should be $35 per day of delay in delivery, in accordance with principle stated in my above-mentioned letter.

"Respectfully,

"D. W. FLAGLER,
"*Brigadier-General, Chief of Ordnance.*"

Before signing the contract in its present form the claimant company, by communication of April 20, 1898, requested that the same should be modified in some respects, which request is contained in the following communication:

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa., April 20, 1898.*

"CHIEF OF ORDNANCE, U. S. A.,
"*War Department, Washington, D. C.*

"SIR: Referring to the forms of contract for six 12-inch disappearing gun carriages, carrying the date of April 4, 1898, which have recently been received, but not yet executed, and to the conversation which the writer had with you on Thursday last, we beg to state that on further carefully considering the possibilities of the case we do not believe that we will be able to deliver the six carriages within six months, as
19 called for by the proposed contract. We will, however, undertake to complete, in accordance with our bid, the delivery of the first carriage in four months, the second within five months, and the remaining four at the rate of two per month, thus making the total time of delivery of the six carriages seven instead of six months, it being understood that no penalty will be charged against us for the one month of delay which will thus accrue on the fifth and sixth carriages.

"By agreeing to this proposition the Department will be the gainer, in that the second carriage will be due at the end of the fifth month, while, as the contract now reads, it would *be* not be due until the end of the sixth month.

"With the above understanding confirmed, we will execute the contract as it now stands, except as to the amount of penalty for delay in delivery, which, in accordance with your letter of April 16, will be $35 instead of $75 per day.

"We return the contract forms in order that the change as regards penalty may be made.

"We remain, respectfully,

"THE BETHLEHEM IRON COMPANY,
"R. W. DAVENPORT,
"*Second Vice-President.*"

To which letter the following reply was made:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, April 25, 1898.*

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa.*
"(Through Inspector of Ordnance, U. S. A.)

"GENTLEMEN: In reply to your letter of the 20th instant, I have the honor to inform you that the schedule of deliveries of 12-inch disappearing carriages contained therein will, in view of the earlier resulting delivery of the second carriage, be accepted in lieu of the schedule in the contract, without enforcement of penalties which would result from the change of schedule.

"The amount of the penalty for delay in delivery is changed from $75 to $35 per day in accordance with my letter of the 16th instant, and the contract forms are returned herewith for execution.

"Respectfully,

"D. W. FLAGLER,
"*Brigadier-General, Chief of Ordnance.*"

The above correction was therefore made in the said contract, and the same was duly signed and executed by the claimant company and immediately transmitted to the War Department. A copy of said contract is annexed to and made part of the petition.

VII.

Thereupon the Bethlehem Iron Company proceeded to manufacture the said gun carriages, and ultimately delivered them to the United States, and they were accepted by the latter. The following table gives, first, the date fixed by the said contract for the delivery of each one of said carriages; second, the date of its delivery, and, third, the extent of the delay in its delivery.

Number of carriage.	Date for delivery fixed by contract.	Date of delivery (actual).	Extent of delay.
16	August 4, 1898	January 28, 1899	177 days.
17	September 4, 1898	March 6, 1899	183 "
18	October 4, 1898	April 13, 1899	191 "
19	October 4, 1898	March 18, 1899	165 "
20	November 4, 1898	April 29, 1899	176 "
21	November 4, 1898	May 27, 1899	204 "
	Total delay		1,096 days.

Of the above days of delay, which amounted in the aggregate to 1,096 days, the United States, through the Chief of its Bureau of Ordnance, decided that the Bethlehem Iron Company was responsible for delays to the extent of 100 days upon each of the six disappearing gun carriages, or 600 days in all, but did not charge said company with the balance of

said days, or 496 days in all; which, at the stipulated sum of deduction at $35 per day for each day of delay in the delivery of each gun carriage, amounted to the sum of $21,000, which sum was deducted from the payments made the claimant company, and the balance, or the sum of $195,000, was paid over to the claimant company, who receipted for said payment under the following protest:

"BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa., June 28, 1901.*

"SIR: Under our contract of April 4, 1898, there remains according to our construction of its clauses, to be paid us the sum of $54,000. A voucher is presented to us by the Ordnance Department, dated September 7, 1899, for final payments on six 12-inch disappearing gun carriages (being Nos. 16 to 21, both inclusive), amounting to $54,000, less $21,000 deducted for delays in delivery, making the net amount to be paid $33,000.

"As we do not think all these penalties should have been collected by the Ordnance Department, but think that we are entitled to the sum of $54,000 without deductions, we respectfully notify the Department that we intend to make application to the proper Executive Department or to Congress, and shall pursue any remedy in this matter warranted by law, so that our action in receiving the sum will not be considered to operate as a waiver of our rights hereafter to demand the remainder of the amount claimed by us as due under our contract of April 4, 1898.

"Respectfully,

"THE BETHLEHEM IRON COMPANY,
"ROBT. T. LINDERMAN, *President.*

"To the CHIEF OF ORDNANCE,
"*United States Army, Washington, D. C.*"

21 VIII.

The court finds as the ultimate fact that the defendants' officers hindered and delayed the claimant in the performance of the work by changes in the plans of construction, as alleged in the petition, and in various other ways; but the court also finds that the claimant contributed to the delay in the completion of the work by being insufficiently equipped and prepared to complete it within the time prescribed in the contract and by taking other work to the exclusion of that referred to in these findings; and the court further finds that the transactions in the process of manufacture were so involved and intermerged that it is impossible, on the evidence produced, for the court to ascertain and determine whether the the defendants should be charged with a greater proportion of the delays set forth in the foregoing table in Finding VII than those assumed by the defendants' officers, to wit, 496 days out of the total amount of delays, to wit, 1,096 days.

It does not appear that the defendants were ready to use the gun carriages hereinbefore described at the time when they were finally delivered by the claimant; nor does it appear that they could have used them on their fortifications if they had been delivered at an earlier day. Nor

does it appear that the defendants suffered any injury or damage whatever by the delay of the claimant in delivering the said gun carriages hereinbefore set forth.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment in the sum of twenty-one thousand dollars ($21,000).

OPINION.

Per CURIAM:

In view of the fact that the gun carriages to be manufactured by the claimant were not articles from which the defendants could obtain on their completion a valuable use or profit, such as might be derived from a house or a vessel; and in view of the fact that the deduction of $35 a day on each gun carriage during the period of delay would amount in a year to $12,775, or 35.48 per cent on the cost of each gun carriage; and in view of the fact that the parties in their correspondence and contract designated the above per diem as a penalty, the court does not feel justified in holding that it was mutually intended to be liquidated damages.

Under the decision in The Phoenix Iron Company v. United States (39 C. Cls. R., 526) and the decisions therein cited, the judgment of the court is that the claimant recover $21,000.

BY THE COURT.

22 VI. *Judgment of the court.*

THE BETHLEHEM STEEL COMPANY
v.
THE UNITED STATES. } No. 22628.

At a Court of Claims held in the city of Washington on the 4th day of December, 1905, judgment in the above-entitled case was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the claimant, The Bethlehem Steel Company, do have and recover of and from the United States the sum of twenty-one thousand dollars ($21,000).

BY THE COURT.

23 VII. *Application for and allowance of appeal.*

In the Court of Claims of the United States.

(Term 1905–1906.)

THE BETHLEHEM STEEL COMPANY
v.
THE UNITED STATES. } No. 22628.

From the judgment rendered in the above-entitled cause on the 4th day of December, 1905, in favor of claimant, the defendants, by the

Attorney-General, on the 11th day of January, 1906, make application for, and give notice of an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed January 11, 1906.

JANUARY 15, 1906.

On motion of Assistant Attorney-General Pradt the application for appeal was allowed as prayed for.

BY THE COURT.

24 In the Court of Claims.

THE BETHLEHEM STEEL COMPANY
v.
THE UNITED STATES. } No. 22628.

I, John Randolph, assistant clerk Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled case, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, this 19th day of January, A. D. 1906.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 20060. Court of Claims. Term No. 558. The United States, appellant, v. The Bethlehem Steel Company. Filed January 22d, 1906. File No. 20060.

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